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JOHN T. FEY,

IN THE

Supreme Court of the United States

October Term, 1956

No. 245 MISC.

SAM MCHONEY, HERBERT DUNMEYER, JOHN SMITH, FRANKLIN WHITE, ROBERT JENKINS, CHAPEL MOUZON, LIMON JOYNER, FELIX MCKNIGHT, LUTHER MOORE, THOMAS BURCH and JOHN BOWENS,

Petitioners,

—v.—

MARINE NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MARINE NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on the 23rd day of May, 1956 and the order denying the petitions for rehearing entered on the 11th day of July, 1956.

Opinions Below

The opinion of the United States District Court for the Eastern District of South Carolina (Charleston) is officially reported in 137 F. Supp. 263. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 233 F. 2d 769 and appears on page 212 of the Transcript of Record.

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Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, sections 1254 (1) and 2101 (c), as well as Rule 19 (b) of the Rules of the Court under the Court's power of supervision over the Federal Judicial System, and more particularly on the grounds that the Court of Appeals for the Fourth Circuit has rendered a decision on a question which has not been, but should be settled by this Court and is also in conflict with the decisions of this Court and other Courts of Appeal and in opposition to a construction and application of a safety regulation of the United States Coast Guard given by the Commandant charged with its definition and enforcement.

Questions Presented

1. The sole question considered by the Court of Appeals was—"Did the District Court err in failing to charge the jury as a matter of law that the United States Coast Guard Regulation referring to sulphur as a dangerously inflammable cargo and requiring a 'fire hose supplied with fresh water from a shore supply source' at each hatch, was applicable herein during unloading of sulphur, and that the violation thereof constituted negligence per se?" Was there error on an affirmance that rejected the construction of said regulation made by the Commandant of the United States Coast Guard pursuant to statutory authority, and accepted by the trial Judge as obvious and necessary for the safety of longshoremen who discharge bulk sulphur from the hold of a vessel?

2. Should the manner of interpretation of a Coast Guard regulation by the Court of Appeals, adverse to the eleven petitioners and affecting all maritime workers, be allowed to stand? Further, where the principal basis for the restricted interpretation of a safety regulation is that penal

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provisions might apply to the shipowner, would this not seriously hamper the proper observance and administration of all Coast Guard regulations?

3. As the Commandant's interpretation and its acceptance by the trial Court was the basis of the stipulation severely limiting the issue on appeal, did the Court below err in denying the petition for rehearing which sought to present further argument on the record on appeal wherein clearly appears from incontrovertible physical facts and admissions by the shipowner that the permanently crippled longshoremen, who did not contribute in any wise to the fire and the toxic sulphur fumes resulting therefrom, were clearly and unequivocally deserving of judgment notwithstanding the verdict, or in the alternative, a new trial?

Statutes and Regulations Involved

Under 46 U. S. C. 170, captioned "Regulation of carriage of explosives or other dangerous articles on vessels.—Vessels defined," appears section (7), in pertinent part as follows:

> "In order to secure effective provisions against the hazards of health, life, limb or property created by explosives or other dangerous articles or substances to which subsection (3), (4), (5), or (6) of this section apply—
>
> (a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section. * * *"

The extract from Table K of the Coast Guard Regulation effective February 5, 1952 and applicable at the time of

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the fire involved herein is set forth at length in the opinion below, and in pertinent part reads in its main heading and one sub-section as follows:

> "In the loading or unloading of sulphur in bulk the following conditions shall be complied with:
>
> * * * * *
>
> (g) A fire hose, supplied with fresh water from a shore supply source, shall be available at each hatch through which sulphur is being loaded."

The Court below also referred to the following section (15) of 46 U. S. C. 170:

> "(15) When the death or bodily injury of any person results from the violation of this section or any regulations made in pursuance thereof, the person or persons who shall have knowingly violated or caused to be violated such provisions or regulations shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Also referred to by the Court below was an amendment to sub-section (g) of the pertinent regulation after the accident involved herein, which now reads as follows:

> "(g) A fire hose, preferably supplied with fresh water from a shore supply source, shall be available at each hatch through which sulphur is being worked."

This amendment is announced in Volume 20, Number 113 of the Federal Register, dated June 10, 1955, on page 4052, as follows:

> "The amendments to Subpart-Detailed Regulations Governing Hazardous Articles (46 CFR 146.27) provide for additional containers for Manganese Dioxide, and

stantial rights of petitioners, where it affirmatively appears from the record that the shipowner's violation of the regulation was proximately related to the injuries sustained.

United States Coast Guard Regulation 146-27-100, Table K, Classification:—Hazardous Articles (N-347), published by the Treasury Department, United States Coast Guard, Washington, D. C., April 9, 1944, revised July 17, 1950, referring to sulfur as "dangerously inflammable," reads in pertinent part as follows:

> "In the loading or unloading of sulfur in bulk the following conditions shall be complied with:—
>
> • • • • •
>
> (g) A fire hose supplied with fresh water from a shore supply source shall be available at each hatch through which the sulfur is being loaded."

Respondent contended at the time of trial that this regulation was not applicable while the longshoremen were engaged in unloading sulfur, as the word "unloading" did not appear in sub-paragraph (g). Petitioners' trial counsel offered in evidence telegraphic communications to and from the Commandant, U. S. Coast Guard, wherein appears his answer that:

> "LOADING AND UNLOADING BULK SULPHUR SAME HAZARDS PREVAIL WHILE UNLOADING AS WHILE LOADING SULPHUR THEREFORE PARA G APPLIES" (Plaintiffs' Exhibit 11, 139a).*

Over defendant's objection, the trial Court admitted the wires in evidence. This was on November 24, 1954, eight days before the charge to the jury and the verdict for de-

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* Numbers in parentheses with suffix "a" are page references to petitioners' appendix to brief in Court below; those with suffix "A" refer to respondent's appendix below.

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fendant on December 2, 1954. The following colloquy, before the Thanksgiving recess, is the only reference by the trial Court in the presence of the jury concerning its reserved interpretation of this regulation:

> "The Court: Mr. Hollings, I have given considerable thought to this matter in view of the testimony that has been offered, and yesterday I wasn't in a position to give any interpretation of it. But regardless of this statement here, *if it is left to me to interpret it,* I would conclude, in view of the testimony that has been offered, that it applies to loading and unloading.
>
> Mr. Hollings:* Then, if your Honor please, what is the ruling as to Plaintiffs' Exhibit 11?
>
> The Court: I see no objection to offering it because *I am going to rule* that this is a proper interpretation * * *" (137a, 138a, emphasis supplied).

This ruling on the offered exhibit was never subsequently commented on by the trial Judge in the presence of the jury, nor was it ever clearly and unambiguously expressed as an instruction that the jury was compelled to follow.

At the close of all testimony, prior to charging the jury, the trial Court refused plaintiffs' request to charge the jury that "* * * the regulation of the Coast Guard requires a connection with a shore water source, while loading as well as unloading sulfur," as follows:

> "The Court: You are going to argue that question. I want to leave out of the charge anything that *relates to the facts.*
>
> Mr. Klonsky: *That is a question of law, Your Honor,* you are interpreting a law, a regulation.

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* Mr. Hollings and Mr. Klonsky were trial counsel for the plaintiffs; Mr. Waring and Mr. Connor were trial counsel for the defendant.

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The Court: *I don't look at it that way.*

Mr. Klonsky: All right, sir. *Please note an exception for the plaintiffs"* (108a, emphasis added).

The colloquy following the charge clearly shows that the Court did only invite "other requests," affirmed the recording of prior exceptions, and that the exception by plaintiffs' counsel to the refusal to instruct the jury was not withdrawn, as follows:

"The Court: I believe there are no *other Requests* to Charge, are there?

Mr. Klonsky: No, your Honor (30a).

• • • • •

Mr. Waring: I am just asking that the record show that the *exceptions made and discussed with the Court in connection with the charge shall apply to the charge as given.*

The Court: Yes, *that is satisfactory.* Didn't you have an exception?

Mr. Klonsky: *I have no exceptions,* your Honor.

The Court: No, you just had a motion.*

Mr. Klonsky: That is right, sir" (32a, emphasis added).

By reason of the Court's refusal to charge, defendant's counsel was thereby licensed to speculate with the jury in his summation as to whether the regulation "in fact" applied to unloading sulphur (109a).

The error is accentuated by the statement on record by one of respondent's trial counsel, out of the hearing of the jury while agreements and disagreements were being recorded, as follows:

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* Referring to plaintiffs' motion for a directed verdict at the close of proof.

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"Mr. Connor: Let's put it this way: If the regulation was unambiguous—and to give the Coast Guard the benefit of the doubt, I say it isn't ambiguous at all. It is clear and simple.

Mr. Klonsky: That is what the Commandant of the Coast Guard said in the communication to us.

Mr. Connor: I would agree that if the regulation about which this matter has turned included the words 'or unloading' and we failed to observe that particular paragraph, the ship would be negligent" (103a, 104a).

There was no hose at the particular hatch connected to a shore supply of fresh water where pressure would have been available, immediate and sufficient. This is corroborated by all the testimony, particularly by the Ship's Master Karl Sietz, who testified in an examination of the defendant before trial as follows:

"Q. Did you have a fire hose supplied with fresh water from a shore supply source? A. No, we did not.

• • • • •

Q. There was no connection between any water supply going to this hose and any shore facility, was there? A. No" (37a, 38a).

Though defendant's proof by itself was sufficient to support a plaintiffs' judgment notwithstanding any verdict, the Court below, on considering the motion, made this significant statement:

"The Court: I don't think there is any question about it, taking the plaintiff's testimony, without any other testimony, the ship was liable" (120a).

On appeal, the Court below disagreed with the titular chief draftsman of the pertinent regulation, the Commandant of the U. S. Coast Guard, as well as the trial Judge,

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and disposed of the appeal without consideration of the issues related to liability predicated on physical facts and admissions that prompted plaintiffs' motion for a directed verdict at the close of the case, and thereafter, a motion for judgment notwithstanding the verdict, or in the alternative, a new trial. There is no reference in the appellate opinion below as to the unequivocal interpretation of the regulation applying during "unloading" as made by the Commandant during the course of trial, but on the contrary, the opinion states that the draftsman must have meant the opposite, with an admission that the Court's contrary interpretation was arrived at without any prior decisional authority, as follows:

> "We, therefore, think that the preliminary statement that the prescribed conditions apply to 'the loading *or* (a disjunctive conjunction) unloading of sulphur', followed by specific provisions, some of which apply to loading, others only to unloading, and some to both operations, show clearly that the draftsmen of the Regulation clearly recognized the difference between the loading and unloading of sulphur and for these two operations they prescribed different precautions. Thus, in sub-section (g), which is before us, it is definitely stated that 'A fire hose * * * shall be available at each hatch through which the sulphur is *being loaded.*' (Italics ours.) Not a mention of 'unloading'. *Expressio unius est exclusio alterius.* There appear to be no decided cases directly in point here."

Stating that the safety regulation "should not be expansively interpreted" by reason of the penal provisions of the regulation, the appellate Court below cites *Kordel* v. *United States,* 335 U. S. 345, a case concerned with the review of a judgment affirming a conviction for introducing misbranded drugs into interstate commerce, and *Schmokey* v.

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United States, 182 F. (2d) 937, a case concerned with a conviction for embezzlement.

Also in the appellate opinion below is discussion of the amended sub-section (g), admitting that it now clearly applies to "the loading and unloading of sulphur," but nonetheless upholding respondent's contention "that the amendment changed the meaning of sub-section (g) and for the first time brought unloading within the ambit of the subsection."

In Volume 20, Number 113 of the Federal Register, dated June 10, 1955, on page 4052 thereof, appears the following:

> "The amendments to Subpart-Detailed Regulations Governing Hazardous Articles (46 CFR 146.27) provide for additional containers for Manganese Dioxide, *and editorial changes to the note regarding 'Sulfur'* (46 CFR 146.27-100)." (Emphasis added.)

It is significant that the editorial changes followed the trial and communications with the Commandant, and were not based on a public hearing for the purpose of effecting any change of intent thereof, as would be required under section (9) of 46 U. S. C. 170.

The appellate opinion below concludes, without reference to the record, that there was "abundant evidence from which the jury could have found that there was an adequate supply of water from the shore which was actually used to extinguish the fire," and that though the trial Judge should have interpreted the regulation and not the jury, "he stated in the presence of the jury that, in his opinion, the Regulation applied to unloading as well as loading but left this question to the jury in his formal charge, to which no exception was taken," and finally, that there was no error in failing to charge the jury that sub-section (g) was applicable to the unloading of sulphur.

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There is contained *supra* those portions of the record pertinent to whether the trial Judge adequately instructed the jury as a matter of law as to the interpretation of the regulation, and also as to whether or not petitioners' trial counsel recorded a timely exception. It is also significant that the petitioners' counsel had presented a proposed charge wherein this interpretation was contained, and deleted by the trial Judge from his final charge, as set forth on page 22-A of respondent's appendix. The balance of this "Statement of the Case" will be concerned with a concise presentation of the physical facts and admissions by respondent's witnesses for this learned Court's determination as to whether there was that "abundant evidence" to support the judgment below.

At the time of the fire the longshoremen were in the lower hold and wings of the #2 hatch, having already discharged more than three-quarters of the crude bulk sulfur (36a, 37a). The bulkheads and 'tween deck in the hatch had been previously sprayed with red lead and fish oil (37a). There was no fire hose supplied with fresh water from a shore supply source (37a), and the ship's hydrants on the main deck were able to bring forth river water by starting pumps in the engine room (14a, 38a).

The ship's Master, Sietz, reported to the United States Coast Guard that the fire started at 5:10 P. M. and that about 5:30 P. M. the last longshoreman in the hold "had found his way out" and that by 5:40 P. M. the fire was completely extinguished (40a). That eleven longshoremen were taken to a hospital, nine released and two retained for further treatment (40a).

The entry made by the local fire department concerning the fire is as follows:

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"February 5, 1952

SS MARINE MERCHANT—Columbus St. Dock, Telephone call received at 5:10 P. M., on arrival of Company #7, found sulphur afire in #2 hole of ship, caused by sparks from steel bucket striking side of hatch of ship. A radio call was also received for a foamite truck and a resusciator. Company #3 responded with the foam generator and company #2 responded with the Resusciator. The resusciator was used for 20 minutes on Herbert Dynmeyer, colored, who was overcome by sulphur fumes, he was revived and sent to Roper Hospital. Agent for ship—Carolina Shipping Company. Fire was extinguished with 20 gallons of foamite and 1 engine stream. Companies 2, 3 7 service truck and Battalion Chief responded.

Damage ? Alarm by citizen"

(Plaintiffs' Exhibit 18, 142a.)

Fire Battalion Chief E. T. Garris of the Charleston Fire Department testified that when he and his men arrived he saw no ship's hose directed on the fire, that the fire was fought with fire department foamite and water for about twenty minutes, with smoke coming out of the hold "pretty strong," and that the last company report was made 45 minutes after arrival. William L. De Witt, a local fireman, testified that he was overcome by smoke when he was only halfway down the single escape ladder, while attempting to rescue the trapped longshoremen.*

A witness for the defendant, Anthony J. Arent, identified in the answers to interrogatories as the Second Assistant Engineer on duty in the engine room at the time of the

* This paragraph without reference to record was part of brief to Court below pursuant to its Rule 10-2(c) that facts can be set forth in this manner if unquestioned by parties.

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accident, testified at the time of trial that, in fact, he was not in charge of the engine room at the time of the fire (122a). He stated that a night relief engineer was in charge where the ship's pumps were located (122a, 123a), and that he was on the boat deck, above the main deck, when he saw smoke coming from the #2 hatch. Instead of ringing the general alarm nearby, he went down to the engine room where he touched a steam valve on the fire pump to increase pressure already on the line. That it took him about two minutes to come down from the main deck and in that time he did not hear the general alarm (125a, 126a). It was his testimony that when there is some pressure maintained on the line, full pressure would go on in thirty seconds or less, and that while he increased the pressure already there the night engineer was right in back of him "all this time" (126a, 127a).

This Night Relief Engineer J. T. McGlothlin, is found in the Engineer's Log Book *as first having signed in for duty at 8:00 P. M.*, approximately three hours after the fire was discovered (141a). From this it is apparent that the Night Engineer was not on watch at the time Arent went to the engine room, the latter having left a position on the boat deck where he could have himself sounded the alarm and communicated with anyone maintaining pressure on the ship's pumps in the engine room by ship's telephone. This significant log entry shows that there was no one to maintain pressure on the line so as to enable Arent to turn on full pressure of pumps already in operation, within thirty seconds.

Defendant's expert in chemistry, Mr. William Schirmer, gave testimony to show on the physical facts that the sulfur fire was caused to spread, and cause extensive physical damage, by reason of the shipowner's violation of the pertinent Coast Guard regulation which provided for immediate pressure and fresh water from a shore source "at

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each hatch." The major points of his testimony, without contradiction, are as follows:

1. Sulfur is slow burning and could be easily extinguished (86a).

2. Fish oil in the hold would burn (94a).

3. The use of river or sea water would generate a certain amount of hydrochloric acid (87a).

4. On the basis of one pound of sulfur burning in the area of the hatch area the concentration would be 120.6 parts per million, and that he had experienced no ill effects with the concentration up to 300 or 400 parts per million (86a, 88a), it necessarily follows that the fire must have been allowed to spread and become extensive so as to cause such pulmonary injuries as required hospitalization for all petitioners and the use of a resuscitator for twenty minutes on at least one. (The permanent injuries are more extensive than the record shows, and reports by the shipowner's examining doctors to this effect were known to the trial Judge.)

The trial Court's opinion refers to testimony by two of the employees of the stevedoring company "that a hose with fresh water from a shore supply source was lying upon the dock near the No. 2 hatch and that this hose was promptly brought into action after the fire began" (10a, 11a). This conclusion is adopted without discussion by the appellate opinion below. With respect to this dock hose, not meant to be available at any particular hatch, Frank Mathis, one of these two men referred to in the opinion and a witness for the shipowner, testified clearly as to the inadequacy of this hose, the unavailability of ship's hoses, and the delay in applying water to the slow burning sulfur fire.

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Mathis testified that after noticing smoke coming from the No. 2 hatch he went to the ship's hose box and found it coiled up and unavailable for prompt use, that the ship's hydrants were turned and no water came out, and that he was compelled to go to the dock for a hose that wasn't long enough to get to the hatch (149a). In part Mathis' testimony is corroborated by the other employee of the stevedoring company referred to in the initial opinion, one Willie Butler, who testified that the longshoremen were compelled to go to the dock for a hose before the ship's hoses could be put on the fire, and neither witness could state how long before the local Fire Department arrived at the scene that any water had actually been applied to the fire (149, 150).

Other items of unseaworthiness and negligence causing or contributing to the proximate cause of petitioners' permanent injuries, to which they did not contribute in any way, would greatly expand this statement, perhaps unnecessarily in the light of what has already been stated. They all point to the respondent's unquestioned violation of the U. S. Coast Guard regulation and the negligent increase of the magnitude of risk to which the longshoremen discharging the extrahazardous cargo of crude sulfur were exposed.

Reasons for Granting the Writ

1. The interpretation of the safety regulation involved by the appellate Court below is at variance with the agency which promulgated the regulation in accordance with statutory authority. If this interpretation is permitted to stand it will represent a serious hindrance to the effective administration of the law by the agents charged with its enforcement.

2. The Court below states that "there appear to be no decided cases directly in point here" as regards the manner in which the interpretation was resolved in direct opposition to the construction by the Commandant of the U. S. Coast Guard and the trial Judge, thereby demonstrating that the issue is novel and will be involved in numerous cases pending under all Coast Guard safety regulations. It is desirable that there be an early and definitive ruling by this Honorable Court to resolve conflicts certain to arise with respect to the construction or application of a maritime safety regulation by the agent empowered by statute to do so, and any Court which would subvert consideration of paramount issues of liability to a strained and contrary interpretation of any regulation designed for the safety of longshoremen and harbor workers.

3. There is no class of maritime workers greater in number than longshoremen who load and discharge cargo on ships, and together with the eleven petitioners, importance is demonstrated by the fact that many individuals are affected by the decision below, which decision erroneously limits its interpretation by reason of penal provisions that might apply against a culpable shipowner and is in complete disregard of the physical facts and uncontroverted admissions by the shipowner herein and its witnesses that but for the violation of the regulation involved, and other breaches of the warranty of seaworthiness, the serious and permanently disabling injuries of petitioners could not have been sustained.

ARGUMENT

The novel and retrogressive interpretation by the Court of Appeals of a safety regulation for all longshoremen requiring at each hatch through which sulfur is being loaded "a fire hose supplied with fresh water from a shore supply source," particularly as to the manner of interpretation that will seriously limit the authority of the agent authorized to promulgate, define and enforce all safety regulations, and cripple the effectiveness of such regulations designed as humane and necessary, deserves the consideration attendant on granting the petition herein.

The Commandant of the United States Coast Guard, as the principal agent empowered by statute to promulgate, define and enforce safety regulations for the benefit of longshoremen who work in extrahazardous places with extrahazardous cargo aboard merchant ships, must not be frustrated in his fair and reasonable construction of a regulation designed to promote safety, where the admitted violation of the regulation as so defined is proximately related to severe disabilities sustained by petitioners.

The appellate Court below did disregard the Commandant's interpretation, and substituted a strained and erroneous construction to defeat the unequivocal definition that the crucial paragraph "g" means that as to the dangerously inflammable bulk sulfur cargo the "same hazards prevail while unloading as while loading sulphur therefore Para G applies." The regulation itself requires a fire hose "at each hatch *through which* the sulphur is being loaded," not "in which" it is being loaded, clearly justifying the Commandant's interpretation where the sulfur was in fact being loaded through the hatch onto railroad cars at an adjacent siding.

Though conceding the manner of its interpretation of the pertinent regulation is *res integra,* the appellate opinion below cites a decision of this Court and one of the Tenth Circuit Court of Appeals to support its restricted construction. Neither of these cases concerns a safety regulation. In *Kordel* v. *U. S.,* 335 U. S. 345, a review of a conviction for introducing misbranded drugs into interstate commerce, this Court stated on page 349 as follows:

> "But there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it."

In *Schmokey* v. *U. S.,* 182 F. (2d) 937, concerned with a conviction for embezzlement, the Court stated on pages 937 and 938, as follows:

> "A criminal statute must be strictly construed and not extended in its operation to persons not within its descriptive terms *or the fair and clear import of the language used.*" (Emphasis supplied.)

Petitioners contend that the very cases cited in support of the interpretation by the Court of Appeals herein are actually in conflict therewith.

The substance of these cases, however, is a far cry from the purpose and effect of safety regulations and the penal provisions therein designed to effectuate enforcement. Great harm will result to any effective enforcement of such regulations if the provisions designed to give them teeth are the basis of their debilitation. Though the regulation in point is enforceable by a penal provision, it is clear in Title 46 U. S. C. A., Section 170, subsection 7 (15) that punishment follows only when there are "persons who shall have knowingly violated or caused to be violated

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The plain errors are resolved from a verdict prompted by a vague and misleading charge by the Trial Court, found to be erroneous by the Court of Appeals; as well as a record that unquestionably demonstrates the shipowner's liability irrespective of any jury verdict, which the Appellate Court below erroneously failed to consider.

The major point on appeal below was that the trial Judge's ruling on an exhibit could not be deemed a definitive instruction to the jury on the United States Coast Guard regulation as a matter of law, and therefore it followed that the refusal to charge on this crucial matter constituted reversible error.

On this the opinion below actually agrees, as follows:

> "It is true that the interpretation of the regulation was a matter for the Judge and not the jury * * *."

Reversal was refused, however, by concluding without reference to the record that "he left this question to the jury in his formal charge, to which no exception was taken." Clearly an exception was taken on this very refusal to charge, in the following clear and concise language:

> "Please note an exception for the plaintiffs" (108a).

The position of plaintiffs to the refusal to charge as they proposed, and specifically deleted by the trial Judge on the ground "that relates to the facts," was unquestioned. Where a point is made clearly, plaintiffs' counsel did not even have to formally except, though he did. This is the proposition of law in the Court of Appeals for the Second Circuit in the case of *Keen* v. *Overseas Tankship Corporation*, 194 F. (2d) 515, 519, and where it conflicts with the

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appellate opinion below, there is additional reason for a review by this learned Court.

There is also disregard of the long established principle that it is error to submit a question of law to the jury. *McFadden* v. *Parker,* 4 U. S. 275, 4 Dall. 275; *Hickman* v. *Jones,* 76 U. S. 197, 9 Wall. 197; *Parks* v. *Ross,* 52 U. S. 362, 11 How. 362.

The Court below would excuse the failure to charge on the ground that "During the course of the trial he stated in the presence of the jury that, in his opinion, the Regulation applied to unloading as well as loading * * *," where this comment was actually circumscribed by the remark of the trial Judge "If it is left to me to interpret it * * *" Not only does this conflict with the decisions of this Court cited above, but it also does violence to the accepted definition and proper application of a "charge to the jury." See *Corpus Juris Secundum,* Vol. 88, Section 266, page 725, West Publishing Co., 1955 and 53 *Am. Jurisprudence,* Trial, Section 555, wherein is distinguished an instruction from controverted matters of fact, and that instructions which tend to confuse the jury in the consideration of the issues in the case are grounds for a new trial or reversal.

Where the instruction is confusing and ambiguous, as in the instant case, and admitted as such by the appellate opinion below, regardless of the issue of the omission of the Commandant's interpretation, the parties here were "entitled to have the jury plainly and correctly instructed so that there will be no misapprehension as to the law of the case." *Atlantic Coast Line R. Co.* v. *Dixon,* 189 F. (2d) 525, 528, cert. den. 342 U. S. 830.

Also see:

McCandless v. *United States,* 298 U. S. 342, 347, 348;

Lynch v. *Oregon Lumber Co.,* 108 F. (2d) 283, 286.

The interpretation of the regulation as a matter of law would have established the shipowner's legal obligation to the longshoremen, without which the jury could not determine the relationship of this obligation, and its breach, to the proximate cause of the injuries.

After the appellate opinion below, petitioners sought a rehearing of the decision on the ground that "the interpretation below, found to be erroneous, was also the basis of reliance by appellants on appeal," and "Petitioner therefore respectfully requests leave to present for the learned Court's consideration such additional proof and testimony as had been set forth in appellants' designation of the record on appeal, in the firm belief that the error found by this Court is not alone in a more comprehensively presented record." In the petition, which is part of the papers forwarded to the Clerk of this Court, is set forth the reasons that compelled petitioners to stipulate to the limited issue on appeal. Said petition was denied without opinion, and the Court of Appeals refused to consider the record before it beyond the scope of the limited stipulation itself. Rule 32 of the Revised Rules of the Supreme Court of the United States allows a review on a more complete record.

Petitioners believe that even on the limited issue there is no substantial justice without reversal. For the sake of a full determination on the designated records by both parties, however, petitioners additionally contend that irrespective of the interpretation of the regulation, liability must

follow from the following physical facts and uncontroverted admissions by the shipowner and its witnesses:

1. The slow burning sulfur would not have spread to its extensive proportions, were it not for the failure of the shipowner to furnish petitioners with a safe and seaworthy place to work, particularly ship's hoses with water readily available, which was not available because the ship's log undeniably shows that no crew member, including the Night Engineer, was on duty at the time.

2. Also, the presence of readily inflammable fish oil in the hold wherein was contained bulk sulfur, designated as "dangerously inflammable," coupled with a single escape ladder to the main deck, contributed to and compounded the magnitude of risk to which the longshoremen were negligently subjected.

Even these were deleted from the charge as issues to be determined by the jury. The charge of the trial Court, therefore, failed to apprise the jury of the questions involved and the rules of law applicable thereto, which charge was the result of deleting significant and major portions of the proposed charge drawn up by plaintiffs' counsel at the Court's request, and in effect constituted plaintiffs' requests to charge. All other items of proof set forth in the record, not considered by reason of the strict limitation of the issue on appeal as construed by the Court of Appeals, separately and collectively must leave the Court with a definite and firm conviction that a mistake had been committed. To this is recorded the express exception to the charge and the implied exceptions where the trial Court rejected pertinent portions of plaintiffs' requests to charge.

This learned Court has in recent years frequently recognized the national importance of the maritime industry in its various phases, including stevedoring. The instant case

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presents issues of unquestioned liability, and error on error in both lower Courts concerning an interpretation that had been correctly and necessarily made by the Commandant of the United States Coast Guard pursuant to statutory authority.

WHEREFORE, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

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ROBERT KLONSKY,
On Petition and Brief.

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